APPENDIX A.

Statutory Provisions Involved.

1. Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C., Section 185(a), provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

2. Section 502(g) of the Employee Retirement Income Security Act of 1974, 29 U.S.C., Section 1132(g), provides in pertinent part:

> "(1) In any action under this title by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.
>
> (2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 [29 U.S.C.S. §1145] in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of—
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A).
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate."

3. Section 4301(e) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C., Section 1451(e) provides:

"In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party."

4. Section 1717 of the California Civil Code provides:

"In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.

As used in this section 'prevailing party' means the party in whose favor final judgment is rendered."

APPENDIX B.

Findings of Fact, Conclusions of Law and Order of the United States District Court, Central District of California.

United States District Court Central District of California.

William C. Waggoner, *et al.*, etc., Plaintiffs, vs. Northwest Excavating, Inc., *et al.*, Defendants. Case No. CV 77 3701 FJK.

Filed: June 28, 1978.

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

PROPOSED FINDINGS OF FACT

1. This is an action by trustees to recover fringe benefit contributions allegedly due from defendant under the terms of a Collective Bargaining Agreement between Local Union No. 12, International Union of Operating Engineers, AFL-CIO, and certain employer associations. The employee trust funds were established pursuant to 29 U.S.C. 186(c).

2. The court has jurisdiction of this action under 29 U.S.C. 185(a) of the Labor Management Relations Act. Since the action is based upon an alleged Collective Bargaining Agreement between defendant and the International Union of Operating Engineers, Local Union No. 12, AFL-CIO, a labor organization which represents employees in an industry affecting commerce pursuant to 29 U.S.C. 152(5). The claims arise out of defendant's alleged failure to pay certain fringe benefit contributions to the plaintiffs in accordance with the provisions of the Collective Bargaining Agreement.

3. Plaintiffs are the trustees of the Operating Engineers Health and Welfare Fund, Pension Trust, Vacation-Holiday Savings Trust, and the Journeymen and Apprentice Training

Trust, all established by the representatives of Local Union No. 12 and representatives of various multi-employer associations in Southern California and Southern Nevada. The trusts are express trusts created pursuant to 29 U.S.C. 186(c)(5) to receive payments from employers on behalf of employees under the Collective Bargaining Agreement.

4. Defendant Northwest Excavating, Inc., and its predecessor Northwest Compaction Co., Inc., are and were California corporations organized and existing under the laws of the State of California. Northwest Excavating, Inc., is the successor in interest to Northwest Compaction Co., Inc. Northwest is engaged in the business of renting construction equipment with an operator to building contractors. Northwest is also engaged as a broker in referring independent contractors to construction contractors.

5. Northwest is bound to a Collective Bargaining Agreement with the Union by virtue of membership in the Southern California Contractors Association, an employer group which represents employer-members for purposes of collective bargaining. Defendant is obligated by the agreement to pay to the trustees of the trusts a specified rate of contribution per hour on behalf of employees who perform work covered under the agreement.

6. Pursuant to the agreement, defendant submitted monthly written report forms to the trustees on which forms defendant listed the names of and hours worked by employees of defendant during said months as employees covered under the Collective Bargaining Agreement. Defendant accurately reported and paid all contributions due and as shown to be due by the monthly report forms.

7. From November, 1975, defendant has engaged Frank Sandoval doing business as Sandoval Equipment Repair to perform repair and maintenance to defendant's equipment.

8. Frank Sandoval doing business as Sandoval Equipment Repair has been engaged as an independent contractor in the business of repairing construction equipment since approximately 1971.

9. Frank Sandoval is a self-employed person and an independent contractor and is not an employee of defendant within the meaning of the Act, the Collective Bargaining Agreement, the trust agreements and/or the common law of agency.

10. In the course and conduct of his business, Frank Sandoval utilizes the services of other equipment repair personnel. These persons are not employees of defendant within the meaning of the Act, the Collective Bargaining Agreement, the trust agreements and/or the common law of agency.

11. Frank Sandoval and those who work with him are not subject to control by defendant. It is not within the power of defendant to exercise control over Frank Sandoval and/or those who work with him.

12. The following are independent contractors and are not employees of Northwest, within the meaning of the Act, the Collective Bargaining Agreement, the trust agreements and/or the common law of agency:

a. R. C. Becker
b. Bud Lowe
c. A. O. Strand
d. N. H. Dunaway
e. Bruce Buell
f. Bill Kilmer
g. Jose Luis Sanchez
h. G. MacDonald
i. Robert Buell
j. Jim Edding
k. Buzz McDaniel

l. W. G. Burns
m. Dean Goddard
n. Dave Edding
o. Lynn Peterson
p. Charles Popham
q. Sam Chewning

13. The Collective Bargaining Agreement does not provide that benefits or that contributions be paid on hours worked by Frank Sandoval and those individuals who work with him.

14. The Collective Bargaining Agreement does not provide that benefits or that contributions be paid by Northwest on hours worked by any owner-operator utilized by Northwest in its capacity as a broker.

15. The independent owner-operators referred by Northwest to construction contractors are not employees of Northwest. The independent owner-operators are independent contractors within the meaning of the Act, the Collective Bargaining Agreement and the trust agreements.

16. The owner-operators utilized by Northwest in its capacity as a broker are not those as to whom Northwest owed any obligation to the plaintiffs, for any reason, contractual or otherwise, to make deductions and remit contributions to the trusts.

17. Northwest is not required to pay contributions into the employee fringe benefit trust funds on behalf of persons who are not "employees" within the meaning of 29 U.S.C. 152 et seq., 29 U.S.C. 186 et seq., and 26 U.S.C. 401, the Collective Bargaining Agreement, or the trust agreements.

18. The subcontracting clauses, including Paragraph 22, Page 13 in the Collective Bargaining Agreement effective July 1, 1974 through June 30, 1977 (Plaintiff's Exhibit "1") and Article I, Paragraph B(3), Page 45 of the Collective Bargaining Agreement effective July 1, 1977 to June

15, 1980 (Plaintiff's Exhibit "2") are lawful and enforceable and not in violation of 29 U.S.C. 158(e).

19. The plaintiffs are not entitled to liquidated damages from defendant.

20. Plaintiffs are not entitled to an award of attorney's fees against defendant.

21. Defendant is not entitled to an award of attorney's fees against plaintiffs.

22. Plaintiffs are not entitled to an award of costs, or other costs of suit, against defendant.

23. Defendant is not entitled to an award of costs, or other costs of suit, against plaintiffs.

24. The plaintiffs caused to be published and disseminated to the signatories to the Collective Bargaining Agreement instructions that no employer shall pay trust fund contributions on behalf of any owners, owner-operators, partners, self-employed persons or any person other than a bona-fide operating engineer.

25. Defendant did not refuse to produce or make available to plaintiffs the relevant payroll records requested by plaintiffs.

26. Defendant has not failed to pay fringe benefit contributions as required by the valid and enforceable provisions of the Collective Bargaining Agreement. There is not due and owing to plaintiffs any interest upon such alleged unpaid fringe benefit contributions since no such unpaid fringe benefit contributions exist.

27. Plaintiffs are not entitled to liquidated damages since no trust fund contributions are owed to plaintiffs by defendant. Plaintiffs are not entitled to expenses incurred in any audits of defendant's records.

28. That defendant in proceeding as it did as to utilizing the services of Sandoval and the individuals who work with

him breached defendant's contractual obligations under Paragraph 22, Page 13 of the Collective Bargaining Agreement effective July 1, 1974 through June 30, 1977 (Plaintiff's Exhibit "1") and Article I, Paragraph B(3), Page 45 of the Collective Bargaining Agreement effective July 1, 1977 to June 15, 1980.

29. The damages flowing from defendant's breach is measured by the amount of contributions that would have been due and paid by defendant if Sandoval and the individuals who work with him were employees of defendant within the provisions of the Collective Bargaining Agreement.

PROPOSED CONCLUSIONS OF LAW

1. Northwest is bound to the Collective Bargaining Agreement with Local 12 by virtue of its membership in the Southern California Contractors Association.

2. Northwest is not required to pay contributions into the employee fringe benefit trust funds on behalf of persons who are not "employees" within the meaning of 29 U.S.C. 152 et seq., 29 U.S.C. 186 et seq., 26 U.S.C. 401, the Collective Bargaining Agreement, or the trust agreements.

3. Frank Sandoval and those individuals who work with him are not employees of Northwest within the meaning of 29 U.S.C. 152(3), 29 U.S.C. 186(c), the Collective Bargaining Agreement, the trust agreements, or the common law of agency.

The collective Bargaining Agreement does not provide that benefits or that contributions be paid by Northwest on hours worked by Frank Sandoval and those individuals who work with him.

No employee trust fund contributions can be compelled to be made by Northwest on behalf of Frank Sandoval and those who work with him, to plaintiffs.

4. Owner-operators utilized by Northwest in its capacity as a broker are independent contractors and not employees of Northwest within the meaning of 29 U.S.C. 152(3), 29 U.S.C. 186(c), the Collective Bargaining Agreement, the trust agreements, or the common law of agency.

The Collective Bargaining Agreement does not provide that benefits or that contributions be paid by Northwest on owner-operators utilized by Northwest in its capacity as a broker. No employee trust fund contributions can be compelled to be made by Northwest on behalf of owner-operators utilized by Northwest in its capacity as a broker.

5. The following are independent contractors and are not employees of Northwest within the meaning of the Act, the Collective Bargaining Agreement, and/or the common law of agency:

a. R. C. Becker
b. Bud Lowe
c. A. O. Strand
d. N. H. Dunaway
e. Bruce Buell
f. Bill Kilmer
g. Jose Luis Sanchez
h. G. MacDonald
i. Robert Buell
j. Jim Edding
k. Buzz McDaniel
l. W. G. Burns
m. Dean Goddard
n. Dave Edding
o. Lynn Peterson
p. Charles Popham
q. Sam Chewning

The Collective B[illegible]ining Agreement does not provide that Northwest pay [illegible]efits or contributions on these independent contractors to the plaintiffs. No employee trust

fund contributions can be compelled to be made by Northwest on behalf of said independent contractors.

6. Paragraph 22, Page 13 of the Collective Bargaining Agreement effective July 1, 1974 through June 30, 1977 and Article I, Paragraph B, Page 45 of the Collective Bargaining Agreement effective July 1, 1977 to June 15, 1980, are lawful and enforceable and not proscribed by 29 U.S.C. 158(e).

That Northwest breached its contractual obligations to plaintiffs under said Paragraphs of the Collective Bargaining Agreements by utilizing Frank Sandoval and those who work with him to maintain and repair its equipment.

The damages to plaintiffs occasioned by said breach is measured by the amounts of contributions that would have been due and paid by defendant to plaintiffs if Sandoval and those who work with him were employees of Northwest within the provisions of the Collective Bargaining Agreement. Said damages are in the sum of $18,993.53.

Let judgment be entered accordingly.

JUNE 28, 1978

/s/ Robert J. Kelleher
ROBERT J. KELLEHER,
United States District Judge

United States District Court Central District of California.

William C. Waggoner, et al., etc., Plaintiffs, v. Northwest Excavating, Inc., etc., Defendant. No. CV 77-3701-RJK.

Filed: June 28, 1978.

JUDGMENT.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment in favor of plaintiffs and against defendant be, and the same hereby is, granted, and that plaintiffs, each in his capacity as Trustee of each respective trust, shall recover damages in the amount of $18,993.53 resulting from the breach by defendant Northwest Excavating, Inc. of certain paragraphs of the Collective Bargaining Agreement.

DATED: June 28th, 1978.

/s/ Robert J. Kelleher
ROBERT J. KELLEHER
United States District Judge.

APPENDIX C.

Opinion of the Court of Appeals for the Ninth Circuit.

William C. WAGGONER et al, etc, Plaintiffs-Appellees and Cross-Appellants, v. NORTHWEST EXCAVATING, INC., etc. Defendant-Appellant and Cross-Appellee. Nos. 78-2816, 78-2984.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 18, 1980. Decided April 20, 1981. Rehearing Denied May 15, 1981.

Trustees of union trust funds brought action to recover employee fringe benefit contributions from construction equipment rental company. The United States District Court for the Central District of California, Robert J. Kelleher, J., held in favor of the trustees in part and the company in part, and both parties appealed. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) owner-operators dispatched by the construction equipment rental company to do construction work when its own equipment and personnel were unavailable were independent contractors and not the employees of the construction equipment rental company and, therefore, the company did not have to make employee fringe benefits contributions to the union trust funds for the hours worked by such owner-operators; (2) businessman who was hired to perform the repair and maintenance work on the equipment of the construction equipment rental company was an independent contractor, but the construction equipment rental company's use of such independent contractor constituted a breach of the master labor agreement which obligated it to employ its own employees for repair work and, therefore, the company had to make employee fringe benefit contribution to the union trust fund in an amount equal to what was lost by virtue of its employment of such independent contractor; (3) construction equipment

rental company was not entitled to an award of attorney fees and costs based on California statute requiring mutuality in contract provisions dealing with award of attorney fees and costs; and (4) trustees of union trust funds were entitled to award of attorney fees, costs, and liquidated damages by virtue of the delinquency in making employee fringe benefit contributions that resulted when the construction equipment rental company wrongfully hired independent contractor to perform protected union work, where the trustee's claim was based on a provision of the master labor agreement requiring payment of attorney fees, costs, and liquidated damages in connection with delinquencies in the payment of such contributions.

Affirmed in part and reversed and remanded in part.

1. Labor Relations 131.6

Since construction equipment rental company, which would dispatch owner-operators to do construction work when its own equipment and personnel were unavailable, could exercise little, if any, supervision over the owner-operators or their equipment, but merely participated in the employment relationship between the general contractor and the owner-operator by negotiating the initial rates for the equipment and the operator, such owner-operators were independent contractors and not employees of construction equipment rental company and, therefore, the construction equipment rental company did not have to make employee fringe benefit contributions to union trust funds for the hours worked by the owner-operators. Labor Management Relations Act, 1947, §§ 301, 302(c)(5), 29 U.S.C.A. §§ 185, 186(c)(5).

2. Federal Courts 776

Construction of contractual provision is a question of law subject to de novo review by the Court of Appeals.

3. Labor Relations 131.6

In provision of master labor contract between multi-employer association and union stating that "the owner-operator shall become a bona fide employee of the Contractor . . . upon reporting for work on the second consecutive day," the term "Contractor" referred to the general contractor and required the general contractor to treat owner-operators as employees and to make employee fringe benefit contributions to union trust funds for the hours worked by such owner-operators. Labor Management Relations Act, 1947, §§ 301, 302(c)(5), 29 U.S.C.A. §§ 185, 186(c)(5).

4. Labor Relations 131.6

Although construction equipment rental company leased its fully equipped repair facilities to businessman who performed the repair and maintenance work on its equipment, there was no evidence that the construction equipment rental company had control over the businessman and, therefore, the businessman was an independent contractor; however, the construction equipment rental company's use of such independent contractor constituted a breach of the master labor agreement, which obligated it to employ its own employees for repair work, and, therefore, company had to make employee fringe benefit contributions to the union trust funds in an amount equal to what was lost by virtue of its employment of such independent contractor.

5. Contracts 10(1)

California statute requiring mutuality in contract provisions dealing with award of attorney fees and costs was not applicable to action by trustees of union trust funds against construction equipment rental company to recover employee fringe benefit contributions and, therefore, although the company prevailed on several issues, it was not entitled to

an award of attorney fees and costs based on such statute. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; National Labor Relations Act, § 8(e) as amended 29 U.S.C.A. § 158(e).

6. Labor Relations 131.6

Trustees of union trust funds were entitled to award of attorney fees, costs, and liquidated damages by virtue of the company's delinquency in making employee fringe benefit contributions that resulted when it wrongfully hired an independent contractor to perform protected union work, where the trustee's claim was based on a provision of the master labor agreement requiring payment of attorney fees, costs, and liquidated damages in connection with delinquency in the payment of such contributions. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Wayne Jett, Los Angeles, Cal., for Waggoner.

James G. Johnson, Hill, Farrer &Burrill, Los Angeles, Cal., on brief; Stanley E. Tobin, Los Angeles, Cal., argued, for defendant-appellant and cross-appellee.

Appeal from the United States District Court for the Central District of California.

Before PREGERSON and NELSON, Circuit Judges, and TURRENTINE, District Judge.

PREGERSON, Circuit Judge:

This action was brought by the Trustees of four union trust funds to recover employee fringe benefit contributions from Northwest Excavating, Inc. The Trustees contend that Northwest should have made payments to the trust funds

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*The Hon. Howard B. Turrentine, United States District Judge for the Southern District of California, sitting by designation.

based on the hours worked by one Frank Sandoval and his helpers, and by several owner-operators of construction equipment. After a two-day trial, the district court held Northwest liable solely for contributions for the hours worked by Sandoval and his helpers. The district court declined to award attorney's fees and costs to either party. Both sides appeal.

I. *Facts*

Northwest Excavating, Inc. is a member of the Southern California General Contractors Association, a multi-employer group that bargains collectively on behalf of its members with Local 12 of the International Union of Operating Engineers. As a member of the Association, Northwest signed the Master Labor Agreement (MLA) negotiated between Local 12 and the Association for the years 1974-1977 and 1977-1980. Among other things, the MLA obligates Northwest to pay to the employee benefit trust funds a certain contribution for each hour worked under the MLA by Northwest's employees.

Northwest is primarily engaged in the business of renting construction equipment with operating personnel to building contractors in the construction industry. After receiving a request from a contractor for equipment and operating personnel, Northwest will dispatch its own equipment and personnel, if available. If either or both are unavailable, Northwest then will dispatch independent owner-operators to do the work. The fees earned by the independent owner-operator are paid by the general contractor to Northwest who then tenders the fee to the owner-operator, less a seven percent brokerage commission.

Before November 1975, Northwest employed several people to repair and maintain its own equipment. In November 1975, however, Northwest hired Frank Sandoval

and his helpers to perform the repair and maintenance work. Since 1971, Sandoval has been doing business as Sandoval Equipment Repair.

In 1977 the Trustees of Local 12's employee benefit trust funds informed Northwest that it owed contributions for hours worked by Sandoval, his helpers, and the independent owner-operators Northwest dispatched when its own operators and equipment were unavailable. Northwest refused to contribute, arguing that Sandoval, his helpers, and the owner-operators were independent contractors, not employees, within the meaning of MLA. The Trustees filed suit under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to recover the disputed payments. After a two-day trial, the Honorable Robert J. Kelleher concluded that although Sandoval, his helpers, and the owner-operators are independent contractors, Northwest breached the MLA by employing Sandoval instead of Northwest's own employees to perform the repair work. The court ordered Northwest to tender to the Trustees an amount equal to what the funds lost by virtue of Sandoval's employment. That amount was stipulated to be $18,993.53.

II. *Trustee's Appeal*

The district court found that owner-operators dispatched by Northwest to general contractors were not Northwest's employees but rather were independent contractors. The parties agree that independent contractors, as such, are excluded from the scope of the MLA by virtue of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), authorizing employer contributions to trust funds solely on behalf of employees. The district court also found that although the MLA requires the "Contractor" to put owner-operators on its payroll as of the second day of work, the term "Contractor" refers to general contractors, not to

Northwest acting as a broker. The Trustees argue that these two findings are clearly erroneous.

In distinguishing an employee from an independent contractor, courts apply common law principles of agency to the factual context of each case. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256, 88 S.Ct. 988, 989, 19 L.Ed.2d 1083 (1968)[1] In addressing the issue, this court considers certain factors set forth in the Restatement (Second) of Agency § 220(2):

(a) The extent of control which, by the agreement, the master can exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular operation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

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[1]*NLRB v. United Insurance Co. of America* applied common law agency principles to the term "employee" found in section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3). The trust funds are established on behalf of "employees" pursuant to section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5). Section 501 of the Labor Management Relations Act, 29 U.S.C. § 142, provides that when used in that Act, the term "employee" shall have the same meaning as when used in the National Labor Relations Act. Therefore the cases interpreting the term "employee" under the National Labor Relations Act are applicable to the analysis here.

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Brown v. NLRB, 462 F.2d 699, 705 n. 10 (9th Cir.), *cert. denied*, 409 U.S. 1008, 93 S.Ct. 441, 34 L.Ed.2d 301 (1972). Specifically, this court has stated that the common law agency test rests primarily on the "amount of supervision that the putative employer has a right to exercise over the individual, particularly regarding the details of the work." *Associated Independent Owner-Operators, Inc. v. NLRB*, 407 F.2d 1383, 1385 (9th Cir. 1969); *SIDA of Hawaii, Inc. v. NLRB*, 512 F.2d 354, 357 (9th Cir. 1975). This factor, however, must be tempered by other considerations relevant to the relationship in its entirety. *Associated General Contractors of California, Inc. v. NLRB*, 564 F.2d 271, 279 (9th Cir. 1977); *Merchants Home Delivery Service, Inc. v. NLRB*, 580 F.2d 966, 973 (9th Cir. 1978) ("Other factors which this court has considered are the entrepreneurial aspects of the individual's business; risk of loss and opportunity for profit; and the individual's proprietary interest in his business.").

[1] The district court correctly concluded that the owner-operators were independent contractors and not employees of Northwest. Each owner-operator dispatched by Northwest was not required to accept the offered construction work. Each was also free to render similar services to other contractors. Each owner-operator set his equipment rental rate with Northwest, but was free to renegotiate the rate with the general contractor if the work proved more difficult or extensive than anticipated. Each was supervised, if at all, by the general contractor, not by Northwest, as to the hours, the extent, and the performance of his work. Northwest's only involvement in the employment relationship was to provide timecards to record the hours worked.

The timecards were returned by the owner-operators to Northwest who then billed the general contractor for the services rendered. The rate billed was an hourly rate combining the equipment usage fee with the charge for the operator's labor. The entire payment—less a seven percent brokerage commission—was remitted by Northwest to the owner-operator. Since Northwest may exercise little, if any, supervision over the owner-operators or their equipment, but merely participated in the employment relationship between the general contractor and the owner-operators by negotiating the initial rate for the equipment and the operator, the district court correctly concluded that the owner-operators were independent contractors and not Northwest's employees.

Notwithstanding the district court's conclusion, the Trustees argue that the MLA required that owner-operators eventually become Northwest's employees even though they began their jobsite work as independent contractors. The relevant provisions of the MLA provide:

> The Owner-Operator shall become a bona fide employee of the Contractor as defined in the Agreement upon reporting for work on the second consecutive working day; such employee status to be effective from the first hour of work performed on the preceding working day. The term CONTRACTOR (or EMPLOYER) shall refer to a person, firm or corporation, party to this AGREEMENT.

The Trustees argue that "Contractor" refers to Northwest as a signatory of the MLA and requires Northwest to place owner-operator on its payroll. Northwest, on the other hand, asserts that the MLA requires the general contractors for whom owner-operators work to include them on the general contractors' payrolls. The district court found that the MLA requires that general contractors, not Northwest acting as

a broker, treat owner-operators as employees and therefore pay the appropriate trust fund contributions.

[2, 3] The construction of a contractual provision is a question of law subject to our de novo review. *Transport Indemnity Co. v. Liberty Mutual Insurance Co.*, 620 F.2d 1368, 1370 (9th Cir. 1980); *Republic Pictures v. Rogers*, 213 F.2d 662 (9th Cir.), *cert. denied*, 348 U.S. 858, 75 S.Ct. 83, 99 L.Ed. 676 (1954). After reviewing the record, we find the district court's interpretation of the MLA to be reasonable and correct.

III. *Northwest's Appeal*

[4] The district court found that Frank Sandoval was also an independent contractor and as such could not be considered an employee of Northwest. Under the Restatement guidelines set forth above, this conclusion is correct. Sandoval owns his business and has other customers besides Northwest. Sandoval sets his own hours and billing rates and is not supervised by any of his customers, including Northwest, except to the extent that the customer dictates what it wants accomplished. Although Northwest does lease its fully-equipped facilities to Sandoval, who drives a truck insured and owned by Northwest, there is no evidence that Northwest controls or has the power to control Sandoval who ran his own heavy duty repair business for over four years before acquiring Northwest as a customer. Accordingly we affirm the district court's finding that Sandoval was an independent contractor.

We also affirm the district court's finding that, under the MLA, Northwest was obligated to employ its own employees for repair work and that therefore it breached the MLA by employing Sandoval. The MLA provides in pertinent part:

> Nothing in this Agreement shall limit the right of Contractors to utilize machinery and equipment dealers to perform major repairs on machinery and equipment on or off the jobsite. All other maintenance and repairs which are normally and customarily performed by persons in the classification of Heavy Duty Repairman/ Welder shall be performed by employees covered by this Agreement. . . .

At trial it was established that Sandoval does routine repair work previously done by his predecessor, Hutchison, a heavy duty repairman who was a union employee of Northwest. Initially, Hutchison worked for Northwest without joining the union. His non-union employment was the subject of grievance proceedings. As a result of the proceedings, Northwest began contributing to the trust funds on Hutchison's behalf. The record reflects that Sandoval characterizes his occupation as "heavy duty repairman/welder" and uses the tools of a working mechanic in that classification. Thus the district court properly found that Northwest breached the MLA by assigning routine repair work to Sandoval.[2]

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[2]Northwest asserts that the district court should have refused to enforce the MLA on the theory that the MLA embodied an unfair labor practice forbidden by section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e). We have previously held that "district courts may not decide, independent of the NLRB, the merits of an unfair labor practice defense to enforcement of a collective bargaining agreement in a section 301 action." *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229, 1235 (9th Cir. 1979). *See also Orange Belt District Council of Painters No. 48 v. Maloney Specialties, Inc.*, 639 F.2d 487, 491 (9th Cir. 1980). Northwest attempts to distinguish *Waggoner* on the ground that, unlike the employer in *Waggoner*, Northwest filed unfair labor practice charges with the NLRB which were later dismissed. Northwest's distinction is unpersuasive. Collateral relitigation of charges dismissed by the NLRB is inconsistent with the policies expressed in *Waggoner*; accordingly, we decline to entertain Northwest's section 8(e) defense.

IV. *Costs, Attorney's Fees, and Liquidated Damages*

[5] The district court declined to grant attorney's fees, costs, or liquidated damages to either party. Northwest argues that it should have been awarded fees under Cal.Civ.Code § 1717 which states:

> In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), prohibits a federal court from awarding attorney's fees under state statutes allowing such fees unless the court's jurisdiction is based upon diversity of citizenship. Therefore section 1717 is inapplicable to the instant case. Northwest argues that section 1717 applies here by quoting *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457, 77 S.Ct. 912, 918, 1 L.Ed.2d 972 (1957), to the effect that "state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy." Northwest argues that the mutuality requirement embodied in Cal.Civ.Code § 1717 assures that parties to collective bargaining agreements, as well as third party beneficiaries thereof, will not be coerced into abandoning good faith, meritorious defenses to section 301 claims, and that section 1717 is certain to temper the invocation of federal jurisdiction for the enforcement of questionable contract claims.

We read *Alyeska*, however, as imposing strict limits on the use of state law to support attorney's fees awards. Those limits were not overborne by the federal environmental pol-

icies asserted by the Wilderness Society in *Alyeska*. Nor are those limits overborne by the policies asserted by Northwest in this case. In fact, federal labor policy supports the district court's decision to decline to award fees under section 1717. "Courts must always evaluate litigation under 301(a) with an eye to the policy of uniformity which that statute embodies." *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1111 (9th Cir. 1979). Uniformity would be defeated, with few, if any, countervailing benefits, by applying fifty different state laws on the issue of attorney's fees. Of course, this example is distinguishable from the situation where the parties provide for attorney's fees in their collective bargaining agreement. There, the federal labor policy of enforcing the parties' intent as expressed in their negotiated agreement is paramount. *Cf. Waggoner v. R. McGray, Inc.*, 607 F.2d 1229, 1236 (9th Cir. 1979) ("Courts and arbitrators are permitted to resolve disputes governed by the terms of collective bargaining agreements despite potential conflicts with the NLRB . . . because of the national labor policy favoring resolution of disputes through mechanisms established by the parties to the disputes."). The district court's denial of attorney's fees and costs to Northwest is affirmed.

[6] On the other hand, the district court's denial of attorney's fees, costs, and liquidated damages to the Trustees is reversed. Unlike Northwest, who based its claim for fees on state law, the Trustees base their claim on the following provision of the MLA:

> All signatory Employers found to be delinquent shall pay for all legal and auditing costs in connection with such delinquency, plus liquidated damages in the amount of twenty-five dollars ($25.00) or ten percent (10%) of the total sums of the contributions, whichever

> is greater to the Operating Engineers Health and Welfare Fund.

The district court found that this provision of the MLA applies only when an employer fails to contribute to the trust funds on behalf of its employees and not when the employer fails to contribute on behalf of wrongfully hired independent contractors and their employees who displace union members.

We agree with the Trustees that the district court read the MLA too narrowly. On remand, the district court should determine the amount of attorney's fees, costs, and liquidated damages to be awarded to the Trustees by virtue of the delinquency that resulted when Northwest wrongfully hired Sandoval and his helpers to perform protected union work.

AFFIRMED in part and REVERSED AND REMANDED in part; parties to bear their own costs on appeal.

APPENDIX D.

Order of the Court of Appeals for the Ninth Circuit, Denying Respondent's Motion for Reconsideration.

United States Court of Appeals for the Ninth Circuit.

William C. Waggoner, et al., etc., Plaintiff-Appellees and Cross-Appellants, vs. Northwest Excavating, Inc., etc., Defendant-Appellant and Cross-Appellee. Nos. 78-2816, 78-2984.

Filed: May 15, 1981.

Before: PREGERSON and NELSON, Circuit Judges and TURRENTINE,* District Judge.

The petition for rehearing is denied.

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*The Hon. Howard B. Turrentine, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX E.

Order of the Court of Appeals for the Ninth Circuit, Denying Petitioner's Motion for Reconsideration.

United States Court of Appeals for the Ninth Circuit.

William C. Waggoner, et al., etc., Plaintiff-Appellees and Cross-Appellants, vs. Northwest Excavating, Inc., Defendant-Appellant and Cross-Appellee. Nos. 78-2816, 78-2984.

Filed: August 5, 1981.

Before: PREGERSON and NELSON, Circuit Judges and TURRENTINE,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing. Judges Pregerson and Nelson have voted to reject the suggestion for rehearing en banc and Judge Turrentine has recommended such rejection.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F.

Supreme Court of the United States.

No. 81-843.

Northwest Excavating, Inc., Petitioner, v. William C. Waggoner, et al.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Kaiser Steel Corp. v. Mullins*, 455 U.S. ___ (1982).

IT IS FURTHER ORDERED that the petitioner, Northwest Excavating, Inc., recover from William C. Waggoner, et al. Two Hundred Dollars ($200.00) for its costs herein expended.

February 22, 1982.

Clerk's costs: $200.00.

APPENDIX G.

William C. Waggoner, et al., Plaintiffs-Appellees/Cross-Appellants, v. Northwest Excavating, Inc., Defendant-Appellant/Cross-Appellee. Nos. 78-2816, 78-2984.

United States Court of Appeals, Ninth Circuit.

Sept. 3, 1982.

Trustees of union trust funds brought action to recover employee fringe benefits contributions from construction equipment rental company. The United States District Court for the Central District of California, Robert J. Kelleher, J., entered judgment for trustees in part and the company in part, and cross appeals were taken. The Court of Appeals, 642 F.2d 333, affirmed in part and reversed and remanded in part, and certiorari was granted. Following remand, one of 102 S.Ct. 1417, the Court of Appeals, Pregerson, Circuit Judge, held that evidence sustained finding that provision of collective bargaining agreement specifying that, except for major repairs, all other maintenance and repairs normally and customarily performed by persons in specified classifications would be performed by employees covered by the agreement did not violate statute forbidding labor agreements under which employer agrees to cease doing business with, or to cease handling the products of, another employer, since the purpose of the provision was work preservation.

Earlier opinion reaffirmed.

Wayne Jett, Los Angeles, Cal., for Waggoner.

Stanley E. Tobin, Los Angeles, Cal., argued, for defendant-appellant and cross-appellee; James G. Johnson, Hill, Farrer & Burrill, Los Angeles, Cal., on brief.

Appeal from the United States District Court for the Central District of California.

Before PREGERSON and NELSON, Circuit Judges, and TURRENTINE,* District Judge.

PREGERSON, Circuit Judge:

This case is before us on remand from the Supreme Court, *Northwest Excavating Inc. v. Waggoner*, ___ U.S. ___, 102 S.Ct. 1417, 71 L.Ed.2d 640 (1982). The Court vacated our earlier opinion, *Waggoner v. Northwest Excavating, Inc.*, 642 F.2d 333 (9th Cir. 1981) and remanded the case for further consideration in light of *Kaiser Steel Corp. v. Mullins*, ___ U.S. ___, 102 S.Ct. 851, 70 L.Ed.2d 833 (1982).

In Kaiser Steel, the Supreme Court ruled that a court must entertain a "hot cargo" defense under 29 U.S.C. § 158(e) ("Section 8(e)")[1] "where [that] defense is raised by a party which § 8(e) was designed to protect, and where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought . . . ." 102 S.Ct. at 860.

In *Waggoner*, we declined to address a section 8(e) defense because of our prior ruling that "district courts may

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*The Honorable Howard B. Turrentine, United States District Judge for the Southern District of California, sitting by designation.

[1]Section 8(e), codified at 29 U.S.C. § 158(e), forbids labor agreements under which an employer agrees to cease doing business with, or to cease handling the products of, another employer (hot cargo provision). Specifically it provides in relevant part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer . . . agrees . . . to cease doing business with any other person, and any contract or agreement . . . containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . .

not decide, independent of the National Labor Relations Board, the merits of an unfair labor practice defense to enforcement of a collective bargaining agreement in a Section 301 action." 642 F.2d at 338, n.2, citing *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229, 1235 (9th Cir. 1981).

The Supreme Court in *Kaiser Steel* rejected the argument that the legality under section 8(e) of a contested provision of a labor agreement can be decided only by the NLRB. *Id.*, 102 S.Ct. at 859-60. We therefore address Northwest's section 8(e) defense.

The particular aspect of this case to which the section 8(e) defense is relevant concerns the status of one Frank Sandoval and his helpers, hired by Northwest in November 1975 to repair and maintain its construction equipment. Previously, Northwest had used its own employees to do this work. We agreed with the district court's determination that Sandoval was, as Northwest contended, an independent contractor rather than a Northwest employee. We ruled, however, that by hiring Sandoval, Northwest had breached a provision of the collective bargaining agreement specifying that, except for major repairs, "[a]ll other maintenance and repairs which are normally and customarily performed by persons in classification of Heavy Duty Repairman/Welder shall be performed by employees covered by this agreement." We therefore held that Northwest was liable to the trustees of four union trust funds for employee fringe benefit contributions based on hours worked by Sandoval and his crew. Northwest argued that the provision which it had breached was an unlawful hot cargo clause because that provision required Northwest to cease doing business with Sandoval and his crew if they refused to become Northwest's employees or to become and remain members of the union.

The district court below did consider Northwest's hot cargo defense and found that the challenged provision did not violate section 8(e). We must review that ruling and determine if it is supported by substantial evidence. *National Woodwork Manufacturers' Association v. NLRB*, 386 U.S. 612, 646, 87 S.Ct. 1250, 1269, 18 L.Ed.2d 357.

The key question we must address is whether, under all the surrounding circumstances, the union's objective in negotiating the contested contractual provision was preservation of work for Northwest's employees, or whether the provision was calculated to satisfy union objectives elsewhere. *Id.* at 644-46, 87 S.Ct. at 1268-1269. We emphasize that section 8(e) does not prohibit labor agreements made and maintained to pressure an employer to preserve for its employees work traditionally done by them. *Id.* at 635, 87 S.Ct. at 1263. Relevant to this issue, we stated in our earlier opinion:

> At trial, it was established that Sandoval does routine repair work previously done by his predecessor, Hutchison, a heavy duty repairman *who was a union employee of Northwest*. Initially, Hutchison worked for Northwest without joining the union. His non-union employment was the subject of grievance proceedings. As a result of the proceedings, Northwest began contributing to the trust funds on Hutchison's behalf.

642 F.2d at 338 (emphasis added).

Based on trial testimony it is clear that, as applied to Sandoval, the purpose of the contested provision was work preservation. Thus the district court correctly concluded that the challenged provision did not violate section 8(e).

In light of the foregoing, we reaffirm our earlier decision which affirmed in part, reversed in part, and remanded the matter to the district court for further proceedings.